Office of the State Appellate Defender

Illinois Criminal Law Digest

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In defendant's trial for aggravated criminal sexual assault, complainant testified that defendant forced her to have vaginal intercourse, while defendant claimed that there had been no intercourse. The treating physician, a State's witness, testified that complainant had some cervical redness consistent with sexual intercourse.

Defendant attempted to introduce evidence that sperm (which did not belong to defendant) was found in complainant's vagina to show that she had engaged in sexual intercourse with someone other than defendant in the days prior to the assault. Defendant argued that although such evidence would normally be barred by the rape shield statute, he had a constitutional right to introduce such evidence to refute the inference that complainant had recent sexual intercourse with defendant by presenting evidence that she had intercourse with someone else within 72 hours, which was about the amount of time, defense counsel asserted, that sperm lasts in the vagina.

The court held that defendant failed to provide an adequate offer of proof to create an appealable issue. The sole support for the proffered evidence was counsel's speculation that complainant's cervical inflammation occurred three days before the alleged assault because sperm could persist for 72 hours. Counsel offered no medical testimony to support his bare assertion about the longevity of sperm or about the general persistence of cervical inflamation.

The court rejected defendant's reliance on medical sources cited in the State's appellate brief indicating cervical inflammation can last three days. It was trial counsel's burden to provide a sufficiently detailed offer of proof at trial, not months or years later on appeal. When evaluating an evidentiary ruling for abuse of discretion, the reviewing court must evaluate that discretion in light of evidence actually before the trial judge.

Since defendant did not provide a sufficient offer of proof, his claim was not subject to appellate review.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

§2-6(a)

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Defendant was convicted of violating the Sex Offender Registration Act (730 ILCS 150/6) because he failed to register after having been convicted of aggravated criminal sexual assault and of a prior failure to register. As charged, the offense was a Class 2 felony. The trial court imposed a Class X sentence based on two prior convictions - the same aggravated criminal sexual assault conviction that was an element of the offense, and a prior DUI conviction.

The court concluded that the legislature did not intend for a single conviction to be used both as an element of the offense of failing to register as a sex offender and as a reason to enhance the sentence. Thus, the Class X sentence was void and could be challenged for the first time on appeal from the denial of a post-conviction petition.

The court rejected the argument that the issue was moot because defendant had completed the term of imprisonment. The court noted that defendant was serving a three-year-period of mandatory supervised release on the Class X conviction, and that if he was resentenced on a Class 2 felony he would be subject to only a two-year MSR term. Thus, relief could be granted in the form of a shorter MSR term.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

§2-6(e)

People v. Thomas, 2014 IL App (3d) 120676 (No. 3-12-0676, 10/27/14)

Defendant argued that his felony conviction for resisting arrest should be reduced to a misdemeanor because in his stipulated bench trial he did not stipulate that a police officer had been injured (which was the basis for making his conviction a felony). The State argued that since defendant stipulated that the evidence was sufficient to convict, he could not now argue that the evidence was insufficient.

The court rejected the State's argument. In defendant's first appeal, the court held that the stipulated bench trial had not been tantamount to a guilty plea. Accordingly, under the law of the case doctrine, defendant was not precluded from arguing in his second (current) appeal that the State failed to prove him guilty of felony resisting arrest.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

COLLATERAL REMEDIES

§9-1(c)

People v. Hall, 2014 IL App (1st) 122868 (No. 1-12-2868, 10/20/14)

Defendant was convicted of violating the Sex Offender Registration Act (730 ILCS 150/6) because he failed to register after having been convicted of aggravated criminal sexual assault and of a prior failure to register. As charged, the offense was a Class 2 felony. The trial court imposed a Class X sentence based on two prior convictions - the same aggravated criminal sexual assault conviction that was an element of the offense, and a prior DUI conviction.

The court concluded that the legislature did not intend for a single conviction to be used both as an element of the offense of failing to register as a sex offender and as a reason to enhance the sentence. Thus, the Class X sentence was void and could be challenged for the first time on appeal from the denial of a post-conviction petition.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

§9-1(e)(2)

People v. Brown, 2014 IL App (4th) 120887 (No. 4-12-0887, 10/8/14)

1. A *pro se* post-conviction petition may be summarily dismissed as frivolous or patently without merit only if it has no arguable basis in law or fact. At the first stage of post-conviction proceedings, a defendant raising a claim of ineffective assistance of counsel need only establish that it is arguable that counsel's performance fell below an objective standard of reasonableness and he was arguably prejudiced as a result.

2. During his trial for the first-degree murder of two individuals, defendant asserted a claim of self-defense, but stated on the record that after consulting with his counsel, he did not want the jury instructed on second-degree murder. Defendant was found guilty of both murders and sentenced to natural life imprisonment.

Defendant filed a *pro se* post-conviction petition alleging ineffective assistance of trial counsel for misadvising him about the potential sentence for double murder. Defendant alleged that counsel informed him that he only faced 20-60 years of imprisonment if convicted of both murders. Defendant attached a letter from counsel written on the date of the guilty verdicts, in which counsel stated that the sentencing range was 20-60 years, with an additional 25 years for the firearm add-ons. Counsel also stated that life imprisonment was not a possible sentence in this case.

Defendant alleged that had he known he faced life imprisonment he would not have agreed with counsel's advice to forego tendering a second-degree murder instruction. The trial court dismissed defendant's petition as frivolous and patently without merit.

3. The Appellate Court held that defendant's *pro se* petition made an arguable claim of ineffective assistance. It was undisputed that defendant was subject to mandatory natural life imprisonment and counsel's letter clearly demonstrated that he advised defendant of the incorrect sentencing range.

Defendant had the right to decide whether to ask for second degree murder instructions. By providing defendant with incorrect advice about the sentence he faced, defendant's ability to make an informed decision regarding the jury instructions may have been impaired. Counsel's performance thus arguably fell below an objective standard of reasonableness.

The evidence at trial also supported giving the second-degree instruction and supported defendant's version of events. As such, it was arguable that there was a reasonable probability that if the jury had been instructed on second-degree murder, it would have convicted defendant of that offense rather than first-degree murder. It was thus arguable that defendant was prejudiced by counsel's incorrect advice.

Accordingly, the court found that it was at least arguable that defendant received ineffective assistance of counsel. The court reversed the dismissal of defendant's petition and remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

§9-1(j)(2)

People v. Yaworski, 2014 IL App (2d) 130327 (No. 2-13-0327, 10/6/14)

The right to counsel in post-conviction proceedings is statutory, not constitutional, and defendants are only entitled to a reasonable level of assistance. The right to reasonable assistance includes the right to conflict-free representation.

The court held that it was improper to appoint defendant's trial attorney to represent him in his post-conviction proceedings where defendant had alleged that he had been denied the effective assistance of trial counsel. In **People v. Hardin**, 217 Ill. 2d 289 (2005), the Illinois Supreme Court addressed the question of whether it is a conflict for an attorney from a public defender's office to represent a defendant in a post-conviction proceeding alleging the ineffectiveness of another attorney from that office. The Supreme Court held that such questions should be decided on a case-by-case

basis, and depend on how closely post-conviction counsel's interests are aligned with those of trial counsel. Here, where post-conviction and trial counsel are the same, the interests are identical and the conflict is inherent.

The court rejected the State's argument that under **People v. Moore**, 207 Ill. 2d 68 (2003), defendant's right to different counsel depended on the merits of the underlying ineffectiveness claim. In **Moore** defendant raised a claim of ineffective assistance in a post-trial motion. Here, by contrast, defendant raised his claim in a *pro se* post-conviction petition. The trial court advanced the petition to the second-stage, finding that defendant had made an arguable claim of ineffectiveness. Once his *pro se* petition had cleared the first-stage hurdle, defendant was entitled to an attorney with undivided loyalty. There was no need to once again determine whether the claim had merit.

The case was remanded for further post-conviction proceedings with the appointment of new counsel.

The dissent would follow **Moore** and hold that there was no need to appoint new counsel where the underlying claim of ineffectiveness had no merit.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

CONFESSIONS

§10-5(c)(2)

People v. Patterson, 2014 IL 115102 (No. 115102, 10/17/14)

Defendant, who was 15 years old at the time he confessed, argued that his confession should have been suppressed for three reasons: (1) the police did not make a reasonable attempt to notify a concerned adult; (2) the youth officer improperly participated in the investigation; and (3) under the totality of the circumstances the confession was involuntary. The court rejected all three arguments.

1. When the police arrest a minor without a warrant, they shall immediately make a reasonable attempt to notify either (1) the parent or other person legally responsible for the minor's care, or (2) the person with whom the minor resides, and inform him or her that the minor has been arrested and where he is being held. 705 ILCS 405/5-405(2).

Defendant was a ward of the Department of Children and Family Services (DCFS) living in a residential treatment facility at the time he was arrested. The complainant was a staff member at the facility. When defendant was arrested (on a

Sunday night), the officers told the director of the facility that they were taking defendant to the police station and the director gave them permission to speak to defendant.

Before defendant was interrogated, the youth officer called the director and defendant's DCFS caseworker at her office to notify them that defendant was at the police station and would soon be questioned. The officer failed to reach either person and left voicemail messages for them. After the interrogation, the youth officer called and spoke to the director, who confirmed that the police had permission to speak with defendant.

The court held that while the youth officer could have taken additional steps to notify a concerned adult, such as calling the caseworker at her home, none of these additional steps were required. The statute only requires a reasonable attempt, not perfect performance. While DCFS was defendant's legal guardian, it was less clear who was legally responsible for his care during the year he lived in the treatment facility. And it was at least arguable that the director of the facility where defendant resided was the person with whom defendant resided and bore some responsibility for his care. Accordingly, under these facts the officer made a reasonable attempt to contact the proper person when they contacted the director and attempted to contact the caseworker.

2. The court also rejected defendant's argument that the youth officer did not properly fulfill his role where he spoke to the complainant at the police station and aided the interrogating officer by helping to type defendant's statement, reading it to defendant, and obtaining his signature.

In **People v. Murdock**, 2012 IL 112362, the court held that an officer who took the lead in interviewing the minor defendant could not act as a youth officer or concerned adult while at the same time compiling evidence against defendant. The court did not find the present situation comparable. Here, the youth officer stood by while another officer took the lead in interrogating defendant. Although the youth officer was present during the interrogation, he did not ask any questions.

Moreover, he fulfilled the fundamental duties of a youth officer, such as asking whether defendant needed anything, ensuring that he was properly treated while in custody, and reading and making sure defendant understood his **Miranda** rights. While the officer spoke to the complainant at the station, the record does not show what information he obtained or how that conversation adversely affected his performance as a youth officer. And the ministerial act of helping to type defendant's statement and reading it aloud to defendant did not clearly breach the proper role of a youth officer.

The court also noted that despite the youth officer's complete abandonment of his role in **Murdock**, the court still found that the statements were voluntary and

admissible. While the presence of youth officer is a significant factor in the totality of the circumstances, there is no requirement that a youth officer be present, and the absence of a youth officer will not make the statements per se involuntary.

Here, the youth officer's actions did not remotely approach the complete abandonment of his role as in **Murdock**. If the court did not find statements involuntary in **Murdock**, then it would not find them involuntary here.

3. In determining whether a juvenile's confession was involuntary under the totality of the circumstances, courts must take great care to ensure that it did not result from mere juvenile ignorance or emotion. Relevant factors to consider include the minor's age, mental capacity, education, physical condition, the legality and length of the interrogation, physical and mental abuse by police, the presence of a concerned adult, and attempts by police to prevent or frustrate that presence.

Here, there was no evidence of any police coercion, duress, physical or mental abuse, or overt promises. Defendant based his involuntariness claim on four factors: (1) age; (2) experience; (3) police deception; and (4) time and duration of the questioning. The court addressed the first two factors together, and looking to prior cases where it had upheld confessions, found that neither defendant's age (15) nor his relatively limited experience were enough to make the confession involuntary.

The court further found that the officers' statements that they were going to check video surveillance footage from the area where the assault allegedly took place was not trickery even though the officers did not know at the time they made the statement whether such footage actually existed. The officers did no more than make a truthful assertion about what they intended to do, and as such, the court declined to find that the police engaged in any form of trickery.

Finally the court compared the time and length of the interrogation here to previous cases and held that it did not make the confession involuntary. The police took defendant into custody at 8:30 p.m. and obtained his signed confession at 11:15 p.m., after just 45 minutes of interrogation. Thus, under the totality of the circumstances, defendant's confession was not involuntary.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

CONTEMPT OF COURT

§§12-1, 12-2, 12-4, 12-5
People v. Perez, 2014 IL App (3d) 120978 (No. 3-12-0978, 10/1/14)

1. Criminal contempt arises from conduct calculated to: (1) impede, embarrass, or obstruct the court in its administration of justice; (2) derogate from the court's authority or dignity; or (3) bring the administration of law into disrepute. Direct criminal contempt involves a defiant or disrespectful act occurring in the courtroom and witnessed by the judge. Neither a formal charge nor an evidentiary hearing is necessary in direct criminal contempt. The misconduct is observed by the judge and the relevant facts lie within his or her personal knowledge.

Indirect criminal contempt, by contrast, involves conduct the judge has not personally witnessed. Accordingly, indirect criminal proceedings must be initiated by a petitioner's written request for adjudication and give rise to similar procedural safeguards as those required in criminal proceedings, including the right to be advised of the nature of charge, to be presumed innocent, and proof beyond a reasonable doubt.

Typically, indirect criminal contempt involves a situation where the accused willfully ignores a valid court order. In some unusual situations, indirect criminal contempt involves disrespectful acts to the court's authority, even though such acts were not witnessed by the judge.

2. Defendant was in traffic court waiting to appear on a speeding ticket. When the judge took a recess, defendant left the courtroom and in the hallway a bailiff overheard her say, "I waited all fucking morning and now she takes a break." Defendant walked "all the way down the hall" continuing to swear. The bailiff told her she could not use such language and defendant calmed down.

After the bailiff told the judge about defendant's comments, the judge instructed the State to prepare and file a petition for contempt. The State drafted a document entitled "Court Order," which ordered defendant to "show good cause as to why she should not be held in indirect criminal contempt of court." The judge denied defense counsel's request for a short continuance to prepare for trial, stating that the case was not criminal, but basically civil in nature, and proceeded to trial immediately.

The bailiff testified about what she observed and after arguments by counsel, the judge found defendant guilty of criminal contempt and sentenced her to eight days in jail. In making her findings, the judge again stated that the case was civil in nature and the standard was preponderance of the evidence. The judge found that defendant did not "do something that she was told to do," and engaged in an outburst that was "disruptive to my court and the administration of justice." The judge also found that the words were very disrespectful.

At the end of her findings, the judge stated that it was criminal contempt, and "If you want to say beyond a reasonable doubt...if that's the standard, we will find that beyond a reasonable doubt."

3. The Appellate Court reversed defendant's conviction outright since the evidence did not prove that she engaged in criminal contempt. The court disagreed with the trial judge's finding that defendant's words were disrespectful or that they were intended to embarrass the judge and bring her administration of the law into disrepute. Defendant never communicated her statements directly to the judge and did not identify the judge by name. And her curse word was not linked to the judge herself, but rather was linked to the length of time defendant had been waiting, "all f**king morning." The court noted that defendant's comments about additional delay resulting from a recess may constitute protected speech under the first amendment.

The court also disagreed with the trial judge's finding that defendant did not "do something that she was told to do." There was no evidence that defendant disobeyed a court order requiring her to behave in a certain way in the hallway. Additionally, once the bailiff told defendant not to use profanity, defendant "simmered" down, further showing that defendant did not disobey any directive of the court or an officer of the court.

4. Although unnecessary to the disposition of this case, and conceded by the State on appeal, the Appellate Court noted several ways in which the trial judge's actions violated defendant's right to due process. First, the charging instrument should not have been framed as a petition to show cause since this language applies only in civil contempt proceedings and impermissibly shifted the burden of proof to defendant.

Second, the judge's denial of defense counsel's request for a continuance to prepare for trial deprived defendant of her due process right to have notice within a reasonable time in advance of the hearing. And third, the judge should have voluntarily recused herself since she spoke directly to the State's only witness, the bailiff. Due process requires another judge to hear the case if the judicial target of verbal commentary becomes personally embroiled in the conflict.

Defendant's conviction was reversed.

Because the case was reversed on reasonable doubt grounds, the concurring justice would not have reached the procedural due process issues.

(Defendant was represented by Assistant Defender Mario Kladis, Ottawa.)

COUNSEL

§13-4(b)(3)

People v. Patterson, 2014 IL 115102 (No. 115102, 10/17/14)

To establish ineffective assistance under the second prong of Strickland, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. In reviewing a ruling on a motion to suppress in which counsel's performance is challenged, a defendant must show a reasonable probability both that the suppression motion would have been granted and that the trial outcome would have been different if the evidence had been suppressed.

Defendant argued that trial counsel was ineffective for failing to introduce evidence at his motion to suppress confession hearing about defendant's lengthy history of mental health problems and limited intellectual capacity. This evidence would have showed that defendant was more susceptible to subtle police intimidation and coercion, and if it had been produced there was a reasonable probability defendant's motion would have been granted.

The court held that even if defendant's statement had been suppressed, defendant could not show that the outcome of the entire trial would have changed, resulting in his acquittal.

The complainant and defendant gave two entirely different accounts of what occurred. The complainant, an employee of the residential treatment facility where defendant lived, testified that she was driving defendant back to the facility when he forced her to pull the van over and forced her to have sex with him. Defendant, by contrast, testified that complainant chose to pull the van over and that she initiated sexual contact with him.

The court held that the physical evidence, including complainant's physical injuries, damage to the van, and emotional state upon arriving at the facility, overwhelmingly corroborated complainant's verison of events. Given this evidence, the court held that the jury would not have acquitted defendant even if his confession had been excluded. Defendant thus failed to establish ineffectiveness under the second prong of **Strickland**.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

§13-4(b)(5)

People v. Brown, 2014 IL App (4th) 120887 (No. 4-12-0887, 10/8/14)

1. A *pro se* post-conviction petition may be summarily dismissed as frivolous or patently without merit only if it has no arguable basis in law or fact. At the first stage of post-conviction proceedings, a defendant raising a claim of ineffective assistance of counsel need only establish that it is arguable that counsel's performance fell below an objective standard of reasonableness and he was arguably prejudiced as a result.

2. During his trial for the first-degree murder of two individuals, defendant asserted a claim of self-defense, but stated on the record that after consulting with his counsel, he did not want the jury instructed on second-degree murder. Defendant was found guilty of both murders and sentenced to natural life imprisonment.

Defendant filed a *pro se* post-conviction petition alleging ineffective assistance of trial counsel for misadvising him about the potential sentence for double murder. Defendant alleged that counsel informed him that he only faced 20-60 years of imprisonment if convicted of both murders. Defendant attached a letter from counsel written on the date of the guilty verdicts, in which counsel stated that the sentencing range was 20-60 years, with an additional 25 years for the firearm add-ons. Counsel also stated that life imprisonment was not a possible sentence in this case.

Defendant alleged that had he known he faced life imprisonment he would not have agreed with counsel's advice to forego tendering a second-degree murder instruction. The trial court dismissed defendant's petition as frivolous and patently without merit.

3. The Appellate Court held that defendant's *pro se* petition made an arguable claim of ineffective assistance. It was undisputed that defendant was subject to mandatory natural life imprisonment and counsel's letter clearly demonstrated that he advised defendant of the incorrect sentencing range.

Defendant had the right to decide whether to ask for second degree murder instructions. By providing defendant with incorrect advice about the sentence he faced, defendant's ability to make an informed decision regarding the jury instructions may have been impaired. Counsel's performance thus arguably fell below an objective standard of reasonableness.

The evidence at trial also supported giving the second-degree instruction and supported defendant's version of events. As such, it was arguable that there was a reasonable probability that if the jury had been instructed on second-degree murder, it would have convicted defendant of that offense rather than first-degree murder. It was thus arguable that defendant was prejudiced by counsel's incorrect advice.

Accordingly, the court found that it was at least arguable that defendant received ineffective assistance of counsel. The court reversed the dismissal of defendant's petition and remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

§13-5(d)(2)(a)
People v. Short, 2014 IL App (1st) 121262 (No. 1-12-1262, 10/29/14)

At defendant's trial for attempt first degree murder, unlawful possession of a firearm by a gang member, aggravated unlawful use of a weapon, and aggravated battery with a firearm, the trial court admonished the venire that evidence of gang membership might be presented and asked whether the veniremembers would be able to afford defendant a fair trial in light of such testimony. After the jury was selected, defendant pleaded guilty to unlawful possession of a firearm by a gang member - the only charge to which the gang membership evidence was relevant - and aggravated unlawful use of a weapon. The trial court denied defense counsel's request to have the venire dismissed and a new jury selected, but informed the jury that contrary to the earlier statements no gang evidence would be presented.

In the post-trial motion, defense counsel argued that he had been ineffective for failing to object to the questioning of veniremembers to determine whether they would be unable to afford defendant a fair trial if gang-related evidence was admitted. The Appellate Court rejected the argument that defense counsel suffered from a conflict of interest because he was required to argue his own ineffectiveness.

1. Whether an attorney has a conflict of interest is a question of law which is reviewed *de novo*. Two categories of conflicts are recognized in Illinois: *per se* conflicts, and actual conflicts.

A *per se* conflict exists where certain facts about a defense attorney's status create, by themselves, a conflict of interest. *Per se* conflicts have been recognized in three situations: (1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel is a former prosecutor who was personally involved in the prosecution. Because arguing one's own ineffectiveness does not fall into any of these three categories, the court rejected the argument that a *per se* conflict of interest existed.

The court also concluded that no actual conflict of interest was shown. To show an actual conflict, defendant must show some specific defect in counsel's strategy, tactics, or decision making that is attributable to the conflict. Because the trial court

was aware of the conduct from which the claimed conflict arose, the claim could be resolved based on the record and without any argument by counsel beyond what was presented in the post-trial motion. Thus, counsel was not required to argue his own ineffectiveness.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Jessica Ware, Chicago.)

§13-5(d)(3)(a)(2)

People v. Yaworski, 2014 IL App (2d) 130327 (No. 2-13-0327, 10/6/14)

The right to counsel in post-conviction proceedings is statutory, not constitutional, and defendants are only entitled to a reasonable level of assistance. The right to reasonable assistance includes the right to conflict-free representation.

The court held that it was improper to appoint defendant's trial attorney to represent him in his post-conviction proceedings where defendant had alleged that he had been denied the effective assistance of trial counsel. In **People v. Hardin**, 217 Ill. 2d 289 (2005), the Illinois Supreme Court addressed the question of whether it is a conflict for an attorney from a public defender's office to represent a defendant in a post-conviction proceeding alleging the ineffectiveness of another attorney from that office. The Supreme Court held that such questions should be decided on a case-by-case basis, and depend on how closely post-conviction counsel's interests are aligned with those of trial counsel. Here, where post-conviction and trial counsel are the same, the interests are identical and the conflict is inherent.

The court rejected the State's argument that under **People v. Moore**, 207 Ill. 2d 68 (2003), defendant's right to different counsel depended on the merits of the underlying ineffectiveness claim. In **Moore** defendant raised a claim of ineffective assistance in a post-trial motion. Here, by contrast, defendant raised his claim in a *pro se* post-conviction petition. The trial court advanced the petition to the second-stage, finding that defendant had made an arguable claim of ineffectiveness. Once his *pro se* petition had cleared the first-stage hurdle, defendant was entitled to an attorney with undivided loyalty. There was no need to once again determine whether the claim had merit.

The case was remanded for further post-conviction proceedings with the appointment of new counsel.

The dissent would follow **Moore** and hold that there was no need to appoint new counsel where the underlying claim of ineffectiveness had no merit.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

DISCOVERY

§§15-1, 15-8

People v. Nunn, 2014 IL App (3rd) 120614 (No. 3-12-0614, 10/31/14)

1. Due process requires that criminal defendants have a meaningful opportunity to present a complete defense. The trial court has inherent authority to dismiss charges where the failure to do so would result in the deprivation of due process. The denial of a motion to dismiss is reviewed for abuse of discretion.

Where law enforcement destroys or fails to preserve potentially useful evidence, due process is violated only if the defendant can demonstrate bad faith. When determining whether due process has been violated, courts should consider the degree of bad faith or negligence and the importance of the lost evidence compared to the evidence that was introduced at trial. "Bad faith" implies "a furtive design, dishonesty or ill will."

Whether police violated a duty to preserve evidence depends on whether they acted in good faith and according to normal practice, whether the evidence was significant in defendant's defense, and whether the evidence was of such character that comparable evidence could not have been obtained by reasonable and available means.

2. While officers were arresting defendant on charges of aggravated battery of a peace officer and resisting arrest, several bystanders took video and still photographs on their cell phones. Several of the bystanders testified that they were told by officers they would go to jail unless they stopped recording the incident and erased the recordings they had already made. One of the officers testified that he believed the officers had authority to seize the phones, but that they lacked the manpower to do so. The trial court denied a motion to dismiss the charges due to a due process violation, finding that police did not act in bad faith by ordering the destruction of the videos or by failing to preserve them as evidence.

The Appellate Court reversed, finding that the officers acted in bad faith by ordering the bystanders to delete the recordings despite knowing that the bystanders were legally permitted to record the event and that the officers could seize the phones to preserve the videos for use as evidence. The court noted that even if the officers were correct that they lacked sufficient manpower to seize the phones, they were not justified in demanding that the bystanders delete the videos. Furthermore, even if the officers lacked sufficient manpower to seize the phones at the scene, they could have asked the bystanders to bring their phones to the police station after the arrest.

Because the recordings would have been material to defendant's guilt or innocence in that they would have captured the actions of both defendant and the police, and because no comparable evidence was available, the court concluded that

defendant was denied her due process right to a fair trial. The convictions were reversed.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

DISORDERLY, ESCAPE, RESISTING AND OBSTRUCTION OFFENSES

§16-2

In re Q.P., 2014 IL App (3rd) 140436 (No. 3-14-0436, 10/27/14)

1. Obstruction of justice occurs "when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, [a person] knowingly . . . furnishes false information." 720 ILCS 5/31-4(a)(1). The term "apprehension" is not defined in the statute and is to be given its plain and ordinary meaning. However, criminal statutes are strictly construed in favor of the accused, and nothing is to be taken by implication from the obvious or ordinary meaning of the statute.

Adopting the ruling of **People v. Miller**, 253 Ill. App. 3d 1032, 628 N.E.2d 893 (2nd Dist. 1993), the court concluded that a person is "apprehended" when he or she is "seized" for purposes of the Fourth Amendment. A "seizure" does not necessarily involve a full "arrest," and occurs when an officer by means of physical force or show of authority in some way restrains a citizen's liberty.

Here, the minor's liberty was undoubtedly restrained when he was handcuffed and placed in the back seat of a patrol car because he was a suspect in a burglary. Thus, the minor had been "apprehended" even if he had not been subjected to an "arrest."

2. Because the minor had already been apprehended, he could not have intended to prevent his "apprehension" by giving the officer a false name and birth date. Thus, the minor did not commit obstruction of justice even if he hoped to keep the officer from discovering that there was an outstanding warrant on other charges. The court stated, "[O]ne who is presently seized by the police cannot be seized again."

Because the minor could not have had the specific intent to prevent his own apprehension where he had already been handcuffed and placed in a squad car when he gave false identifying information, the delinquency adjudication based on obstruction of justice was reversed.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

§16-2

People v. Thomas, 2014 IL App (3d) 120676 (No. 3-12-0676, 10/27/14)

To prove defendant guilty of felony resisting arrest, the State had to prove that defendant knowingly resisted an officer in the performance of an authorized act and proximately caused injury to the officer. 720 ILCS 5/3-1(a), (a-7). In a stipulated bench trial, defendant stipulated to the evidence presented at the preliminary hearing and the motion to suppress. The court held that there was no evidence presented at either hearing that the officer was injured. The court thus reduced defendant's conviction to a Class A misdemeanor and remanded for re-sentencing.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

EVIDENCE

§19-7(b)

People v. Patterson, 2014 IL 115102 (No. 115102, 10/17/14)

To preserve an appellate claim concerning the denial of a request to admit evidence, a party is required to make a detailed and specific offer of proof if the record would otherwise be unclear.

In defendant's trial for aggravated criminal sexual assault, complainant testified that defendant forced her to have vaginal intercourse, while defendant claimed there had been no intercourse. The treating physician, a State's witness, testified that complainant had some cervical redness consistent with sexual intercourse.

Defendant attempted to introduce evidence that sperm (which did not belong to defendant) was found in complainant's vagina to show that she had engaged in sexual intercourse with someone other than defendant in the days prior to the assault. Defendant argued that although such evidence would normally be barred by the rape shield statute, he had a constitutional right to introduce such evidence to refute the inference that complainant had recent sexual intercourse with defendant by presenting evidence that she had intercourse with someone else within 72 hours, which was about the amount of time, defense counsel asserted, that sperm lasts in the vagina.

The court held that defendant failed to provide an adequate offer of proof to create an appealable issue. The sole support for the proffered evidence was counsel's speculation that complainant's cervical inflammation occurred three days before the alleged assault because sperm could persist for 72 hours. Counsel offered no medical testimony to support his bare assertion about the longevity of sperm or about the general persistence of cervical inflamation.

The court rejected defendant's reliance on medical sources cited in the State's appellate brief indicating cervical inflammation can last three days. It was trial counsel's burden to provide a sufficiently detailed offer of proof at trial, not months or years later on appeal. When evaluating an evidentiary ruling for abuse of discretion, the reviewing court must evaluate that discretion in light of evidence actually before the trial judge.

Since defendant did not provide a sufficient offer of proof, his claim was not subject to appellate review.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

§19-18

People v. Hood, 2014 IL App (1st) 113534 (No. 1-11-3534, 10/6/14)

1. The right to confront witnesses includes the right to view and hear the witness and to help defense counsel with cross-examination. Although the right to confrontation, like all constitutional rights, may be waived, there is a presumption against waiver, and any waiver must be a knowing, voluntary act with awareness of the consequences. For any waiver to be effective, it must be clearly established that there was an intentional relinquishment of a known right.

2. Here the State conducted an evidence deposition pursuant to Illinois Supreme Court Rule 414, which allows a party to take a deposition if there is a substantial possibility that the witness will not be available to testify at trial. During the deposition, the witness identified defendant as the offender. The prosecutor and defense counsel, but not defendant, were present for the video deposition, and defense counsel cross-examined the witness.

There was no waiver of defendant's confrontation right on the day of the deposition, nor during the next six status hearings. Finally, at a status hearing held over six months after the deposition, the State stated on the record that it had initially requested that defendant be present for the deposition but that defense counsel had waived his presence. Defense counsel confirmed that she had waived defendant's appearance. The video deposition was introduced as evidence during defendant's trial. Defendant made no objection at trial to his absence from the deposition.

3. On appeal, defendant argued that he had been denied his right to confrontation by not being present at the deposition. Although defense counsel stated that she had waived defendant's presence, the record did not show that defendant personally and knowingly waived his right to confrontation.

The Appellate Court agreed. The record contained no waiver of defendant's rights prior to or during the deposition. Additionally, there was no discussion of a waiver during the six status hearings held over a six-month period following the deposition. It was not until over six months later that the parties referred to an alleged off-the-record waiver by defense counsel of defendant's presence at the deposition. The record thus failed to show that defendant knowingly and voluntarily waived his right to confrontation.

4. The court further held that defendant did not properly waive his confrontation rights under Rule 414. Rule 414(e) provides that defendant and defense counsel may waive defendant's confrontation rights at a deposition in a written waiver. The court held that it was error to admit the deposition without a written waiver.

5. Although defendant failed to raise either issue below, the court reached the issues under the second prong of the plain error doctrine. Under this prong, a reviewing court may review procedurally defaulted claims where the error is so serious that defendant was denied a substantial right and thus a fair trial. Prejudice is presumed under the second prong due to the importance of the right involved.

The right to confront witnesses is a substantial constitutional right. Both errors involved the right to confront witnesses and thus they both concerned a substantial right reviewable under the second prong of plain error.

Defendant's conviction was reversed and the case remanded for a new trial.

6. The dissent would not have found a violation of the right to confrontation where defense counsel was present and cross-examined the witness. The dissent also would not have found that any error which might have occurred fell within the second prong of plain error. The second prong only applies to structural errors, a very limited class of cases which does not include defendant's right to be present at a deposition.

(Defendant was represented by Supervisor Shawn O'Toole, Chicago.)

GUILTY PLEAS

§24-8(b)(2)

In re H.L., 2014 IL App (2d) 140486 (No. 2-14-0486, 10/22/14)

Supreme Court Rule 604(d) requires that an attorney who represents a defendant on a motion to reconsider a sentence or withdraw a guilty plea must file a certificate stating that he or she has consulted with the defendant, examined the court file and report of proceedings, and made any necessary amendments to the motion.

Under **People v. Shirley**, 181 Ill. 2d 359, 692 N.E. 2d 1189 (1998), the certificate is to be filed in the trial court at or before the hearing on the motion to withdraw the plea or reconsider the sentence. If the certificate is not timely filed, the appropriate remedy is a remand to afford the defendant another opportunity to be heard on the Rule 604(d) motion.

The court rejected Appellate Court precedent holding that an attorney may comply with Rule 604(d) by filing the certificate after the hearing is completed (rejecting **People v. Grace**, 365 Ill. App. 3d 508, 849 N.E.2d 1090 (4th Dist. 2006); **People v. Travis**, 301 Ill. App. 3d 624, 704 N.E.2d 426 (5th Dist. 1998)).

Because counsel filed the Rule 604(d) certificate three weeks after the hearing on the motion to reconsider the sentence, the cause was remanded for the timely filing of a new certificate, an opportunity for the respondent to file a new Rule 604(d) motion if desired, and a new hearing on the motion.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

JURY

§32-4(a)

People v. Short, 2014 IL App (1st) 121262 (No. 1-12-1262, 10/29/14)

At defendant's trial for attempt first degree murder, unlawful possession of a firearm by a gang member, aggravated unlawful use of a weapon, and aggravated battery with a firearm, the trial court admonished the venire that evidence of gang membership might be presented and asked whether the veniremembers would be able to afford defendant a fair trial in light of such testimony. After the jury was selected, defendant pleaded guilty to unlawful possession of a firearm by a gang member - the only charge to which the gang membership evidence was relevant - and aggravated unlawful use of a weapon. The trial court denied defense counsel's request to have the venire dismissed and a new jury selected, but informed the jury that contrary to the earlier statements no gang evidence would be presented.

The court concluded that the trial court did not err during *voir dire* by informing the jury that gang membership evidence might be introduced. At that point, defendant had not expressed a willingness to plead guilty to unlawful possession of a firearm by a gang member, and had merely unsuccessfully sought to have a bench trial on that charge. Thus, the trial court admonished the venire in accordance with its reasonable expectation that gang-related evidence would be presented. Once defendant pleaded guilty to the only charge on which such evidence could have been admitted, the judge

properly instructed the jury that despite the earlier statements, no gang evidence would be presented.

The court added that even if the trial court erred, defendant was not prejudiced. A defendant facing charges that require evidence of gang membership is entitled to have the jury questioned during *voir dire* to determine if he will be prejudiced by admission of such evidence. **People v. Thompson**, 2013 IL App (1st) 113105. Here defense counsel was satisfied after *voir dire* that the jurors would not hold evidence of gang membership against defendant. There is no basis to argue that the jury could no longer be fair and impartial after it was told that gang evidence would not be presented.

Although defendant speculated that the jury would likely assume that he was guilty of the charges that were dropped, the court found that it is "[e]qually possible that the jury assumed the State dropped the charges because it would not be able to prove them." The court also noted that the jury acquitted defendant of attempt first degree murder and convicted only on a lesser charge, further establishing that it was likely not affected by the trial court's reference to gang evidence.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Jessica Ware, Chicago.)

JUVENILE PROCEEDINGS

§33-3

People v. Patterson, 2014 IL 115102 (No. 115102, 10/17/14)

The automatic transfer statute requires juveniles who are at least 15 years old and are charged with one of the enumerated offenses to be prosecuted in adult criminal court. The enumerated offenses are first degree murder, aggravated battery with a firearm (if the minor personally discharged the weapon), armed robbery with a firearm, aggravated vehicular hijacking with a firearm, and aggravated criminal sexual assault. 705 ILCS 405/5-130.

Defendant argued that the transfer statute either alone or in conjunction with the consecutive sentencing scheme (730 ILCS 5/5-8-4(a)(ii)) and the truth in sentencing statute requiring him to serve at least 85% of his sentence (730 ILCS 5/3-6-3(a)(2)(ii)), violated (1) the eighth amendment and the proportionate penalties clause of the Illinois Constitution, and (2) state and federal due process, because this statutory scheme does not take the distinctive characteristics of juveniles into account.

1. The eighth amendment protects defendants against cruel and unusual punishments, while the Illinois proportionate penalties clause similarly bars the imposition of unreasonable sentences. U.S. Const., amend. VIII; Ill. Const. 1970, art. I §11. The Illinois proportionate penalties clause is co-extensive with the eighth amendment. Neither clause applies unless a punishment is imposed.

Defendant argued that three recent United States Supreme Court cases, **Roper v. Simmons**, 543 U.S. 551 (2005), **Graham v. Florida**, 560 U.S. 48 (2010), and **Miller v. Alabama**, 567 U.S. ___ (2012), make it unconstitutional to apply adult sentencing standards to juveniles without first taking into account the distinctive characteristics of juveniles.

The court rejected this argument, holding that access to juvenile court is not a constitutional right and trying a defendant in juvenile or criminal court is purely a matter of procedure. Even accepting the assertion that criminal courts always involve lengthier sentences and harsher prison conditions, the court found nothing in defendant's argument that would convert a procedural statute into a punitive one.

In previous cases, the court had already determined that the purpose of the transfer statute was to protect the public, not to punish defendants. The automatic transfer statute reflects the legislature's reasonable decision that criminal court is the proper venue for juveniles charged with certain felonies, and the court declined to second-guess the validity of the legislature's judgment.

2. The court also rejected defendant's argument that the combination of the transfer statute and the applicable sentencing provisions was unconstitutional as applied to non-homicide offenders. Here defendant was sentenced to three consecutive terms of 12 years imprisonment for a total of 36 years, and must serve at least 85% of his sentence. Although lengthy, the court did not find that term comparable to either the death penalty or natural life imprisonment, the sentences involved in **Roper**, **Graham**, and **Miller**. The court thus refused to extend the reasoning of those cases to the sentence imposed in this case.

3. The court also rejected defendant's due process attack. The court noted that it had already previously upheld the automatic transfer statute against a due process challenge in **People v. J.S.**, 103 Ill. 2d 395 (1984) and **People v. M.A.**, 124 Ill. 2d 135 (1988). It found defendant's reliance on **Roper**, **Graham**, and **Miller**, to be inapplicable since those cases involved the eighth amendment, not due process.

The dissenting justice would have found that the automatic transfer statute was punitive and violated the eighth amendment and the proportionate penalties clause.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

REASONABLE DOUBT

§42-3

People v. Costello, 2014 IL App (3rd) 121001 (No. 3-12-1001, 10/23/14)

1. Where an offense involves a failure to perform an act, the defendant may raise an affirmative defense of impossibility if he or she could not have performed the act. Because the facts relevant to an impossibility defense are uniquely within the knowledge of the accused, impossibility is an affirmative defense which must be raised by the defense. In other words, the State is not required to prove in every case involving a failure to act that it was possible for the defendant to perform the act in question.

Thus, unless the State's evidence raises the issue, to assert the affirmative defense of impossibility the defendant must present at least some evidence showing that it was not possible to perform the act in question. Once the issue of impossibility is raised, the State must prove beyond a reasonable doubt that it was possible for the defendant to perform the act in question.

2. Where defendant was charged with violating an order of protection by failing to turn over several weapons which the order of protection stated were kept in a gun safe at his home, defendant did not assert the defense of impossibility by showing that those firearms were not in the safe when police arrived. The mere fact that the firearms were not in the safe did not constitute evidence that the defendant was incapable of complying with the order of protection, as defendant could have hidden the firearms or given them to a friend. "A criminal defendant may not circumvent the provisions of an order of protection by failing to turn over items specified in an order of protection without offering any sort of explanation for his failure to produce the items."

Because defendant failed to present any evidence that it was impossible for him to comply with the order of protection, the burden of proof was not placed on the State. The conviction for violating an order of protection was affirmed.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

SEARCH AND SEIZURE

§44-1(a)

People v. Armer, 2014 IL App (5th) 130342 (No. 5-13-0342, 10/27/14)

1. The act of drawing blood from a DUI suspect constitutes a "seizure" under the Fourth Amendment, and requires a warrant unless there are exigent circumstances which make it impractical to obtain a warrant. Exigent circumstances have been found where the time needed to obtain a warrant would result in the destruction of evidence. Whether exigent circumstances justify a warrantless search in a particular situation is evaluated on a case-by-case basis.

The natural dissipation of alcohol over time does not create a *per se* exigency which categorically justifies an exception to the warrant requirement for nonconsensual blood testing in DUI cases. **Missouri v. McNeely**, ___ U.S. ___, 133 S. Ct. 1552, 185 L.Ed.2d 696 (2013). However, the natural dissipation of alcohol may support a finding of exigency in a specific case where other factors, such as the procedures in place for obtaining a warrant and the availability of a judge, affect whether the police can obtain a warrant within a time period that preserves the opportunity to obtain reliable evidence.

2. The court concluded that there were not sufficient exigent circumstances to justify a warrantless draw of defendant's blood. Defendant was involved in a single vehicle accident, and was taken to the hospital for evaluation of his injuries. One deputy followed the ambulance to the hospital, while a second officer remained at the scene of the accident. A third deputy also came to the hospital. The court found that because three officers were available, the investigation would not have been jeopardized had one of the officers attempted to contact the State's Attorney to secure a search warrant. The court noted that the officer did not testify that a fear of losing relevant evidence caused him to order the warrantless draw, and that he decided not to seek a warrant only because he thought he had probable cause and did not need the State's Attorney's assistance.

The court concluded that under these circumstances, a reasonable officer would not have believed that sufficient exigent circumstances were present to justify the warrantless blood draw. The trial court's suppression order was affirmed.

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

§44-12(c)

People v. Thomas, 2014 IL App (3d) 120676 (No. 3-12-0676, 10/27/14)

1. An initially lawful seizure can violate the fourth amendment if its manner of execution unreasonably infringes on constitutionally protected interests. As an example, a traffic stop may become unlawful if it is unreasonably prolonged beyond the time required to effectuate the purpose of the stop.

Here, the police lawfully stopped a car because the driver did not dim his bright lights. (Defendant was the owner of the car and a passenger.) An officer approached the driver, obtained the necessary documentation, and told the driver that he was going to conduct a free-air canine sniff. The sniff began five to seven minutes into the stop.

The court observed that a number of prior cases have held that the average traffic stop lasts 10 to 12 minutes and thus concluded that the traffic stop in this case was not unreasonably prolonged.

The court rejected defendant's argument that the stop was unreasonably prolonged, not simply because of the duration of the stop, but because the officer's purpose deviated from stopping the car for a headlight infraction to conducting a free-air sniff. The officer had a drug-sniffing dog in his patrol car and conducted the sniff without delay. The officer posed no additional questions to delay defendant and no additional probable cause was needed to conduct the sniff. The change in purpose thus did not create an unreasonable delay.

2. The court also rejected defendant's argument that he was subjected to an illegal search when the police ordered him to roll up the windows and turn on the heater prior to the canine sniff. The court pointed out that the Illinois Supreme Court has already held that this procedure was not sufficiently intrusive to offend the fourth amendment. **Bartelt**, 241 Ill. 2d 217 (2011).

Although the court was bound by **Bartelt**, it believed that the United States Supreme Court would ultimately overrule **Bartelt**. Although a person has a lesser expectation of privacy in a motor vehicle, the procedure employed here was not a free-air sniff of the exterior of the car. Instead, the police forced the car's occupants to make available to the police something that is normally on the interior of the car. This procedure is analogous to ordering a person to empty his pockets and throw the contents onto the ground, at which point the police discover contraband. Such a procedure involves a search governed by the fourth amendment.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

SENTENCING

§§45-1(b)(1), 45-1(b)(2)

People v. Patterson, 2014 IL 115102 (No. 115102, 10/17/14)

The automatic transfer statute requires juveniles who are at least 15 years old and are charged with one of the enumerated offenses to be prosecuted in adult criminal court. The enumerated offenses are first degree murder, aggravated battery with a firearm (if the minor personally discharged the weapon), armed robbery with a firearm, aggravated vehicular hijacking with a firearm, and aggravated criminal sexual assault. 705 ILCS 405/5-130.

Defendant argued that the transfer statute either alone or in conjunction with the consecutive sentencing scheme (730 ILCS 5/5-8-4(a)(ii)) and the truth in sentencing statute requiring him to serve at least 85% of his sentence (730 ILCS 5/3-6-3(a)(2)(ii)), violated (1) the eighth amendment and the proportionate penalties clause of the Illinois Constitution, and (2) state and federal due process, because this statutory scheme does not take the distinctive characteristics of juveniles into account.

1. The eighth amendment protects defendants against cruel and unusual punishments, while the Illinois proportionate penalties clause similarly bars the imposition of unreasonable sentences. U.S. Const., amend. VIII; Ill. Const. 1970, art. I §11. The Illinois proportionate penalties clause is co-extensive with the eighth amendment. Neither clause applies unless a punishment is imposed.

Defendant argued that three recent United States Supreme Court cases, **Roper v. Simmons**, 543 U.S. 551 (2005), **Graham v. Florida**, 560 U.S. 48 (2010), and **Miller v. Alabama**, 567 U.S. ___ (2012), make it unconstitutional to apply adult sentencing standards to juveniles without first taking into account the distinctive characteristics of juveniles.

The court rejected this argument, holding that access to juvenile court is not a constitutional right and trying a defendant in juvenile or criminal court is purely a matter of procedure. Even accepting the assertion that criminal courts always involve lengthier sentences and harsher prison conditions, the court found nothing in defendant's argument that would convert a procedural statute into a punitive one.

In previous cases, the court had already determined that the purpose of the transfer statute was to protect the public, not to punish defendants. The automatic transfer statute reflects the legislature's reasonable decision that criminal court is the proper venue for juveniles charged with certain felonies, and the court declined to second-guess the validity of the legislature's judgment.

2. The court also rejected defendant's argument that the combination of the transfer statute and the applicable sentencing provisions was unconstitutional as

applied to non-homicide offenders. Here defendant was sentenced to three consecutive terms of 12 years imprisonment for a total of 36 years, and must serve at least 85% of his sentence. Although lengthy, the court did not find that term comparable to either the death penalty or natural life imprisonment, the sentences involved in **Roper**, **Graham**, and **Miller**. The court thus refused to extend the reasoning of those cases to the sentence imposed in this case.

3. The court also rejected defendant's due process attack. The court noted that it had already previously upheld the automatic transfer statute against a due process challenge in **People v. J.S.**, 103 Ill. 2d 395 (1984) and **People v. M.A.**, 124 Ill. 2d 135 (1988). It found defendant's reliance on **Roper**, **Graham**, and **Miller**, to be inapplicable since those cases involved the eighth amendment, not due process.

The dissenting justice would have found that the automatic transfer statute was punitive and violated the eighth amendment and the proportionate penalties clause.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

§45-5

People v. Hall, 2014 IL App (1st) 122868 (No. 1-12-2868, 10/20/14)

1. A double enhancement occurs where a single factor is used as both an element of an offense and a basis for imposing a harsher sentence, or where a single factor is used twice to elevate the severity of the offense itself. A double enhancement is improper unless in enacting the statute in question, the legislature intended that a single factor could be used more than once.

Any portion of a sentence that is not statutorily authorized is void and can be challenged at any time. By contrast, an order that is improper because of a mistake of law or fact is voidable rather than void and is forfeited if not challenged at an appropriate time.

2. Defendant was convicted of violating the Sex Offender Registration Act (730 ILCS 150/6) because he failed to register after having been convicted of aggravated criminal sexual assault and of a prior failure to register. As charged, the offense was a Class 2 felony. The trial court imposed a Class X sentence based on two prior convictions - the same aggravated criminal sexual assault conviction that was an element of the offense, and a prior DUI conviction.

The court concluded that the legislature did not intend for a single conviction to be used both as an element of the offense of failing to register as a sex offender and as a reason to enhance the sentence to a Class X. Thus, the Class X sentence was void and

could be challenged for the first time on appeal from the denial of a post-conviction petition.

3. The court rejected the argument that the issue was moot, noting that the defendant was serving a three-year-period of mandatory supervised release on the Class X conviction, and that if he was resentenced on a Class 2 felony he would be subject to a two-year MSR term. Thus, relief could be granted in the form of a shorter MSR term.

4. The court rejected the State's argument that re-sentencing was not required because the same seven-year-sentence that was ordered as part of the Class X sentence could have been ordered as a non-enhanced, Class 2 sentence. Although the sentence that was actually imposed fell within the permissible sentencing range for a Class 2 felony, re-sentencing was required because the trial court relied on the wrong authorized sentencing range when it imposed the Class X sentence.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

SEX OFFENSES

§46-1(b)

People v. Patterson, 2014 IL 115102 (No. 115102, 10/17/14)

The Illinois rape shield statute precludes evidence of a complainant's sexual history except under two narrow exceptions for: (1) evidence of past sexual conduct between the complainant and the defendant; and (2) evidence that is constitutionally required to be admitted. 725 ILCS 5/115-7.

In defendant's trial for aggravated criminal sexual assault, complainant testified that defendant forced her to have vaginal intercourse, while defendant claimed there had been no intercourse. The treating physician, a State's witness, testified that complainant had some cervical redness consistent with sexual intercourse.

Defendant attempted to introduce evidence that sperm (which did not belong to defendant) was found in complainant's vagina to show that she had engaged in sexual intercourse with someone other than defendant in the days prior to the assault. Defendant argued that although such evidence would normally be barred by the rape shield statute, he had a constitutional right to introduce such evidence to refute the inference that complainant had recent sexual intercourse with defendant by presenting evidence that she had intercourse with someone else within 72 hours, which was about the amount of time, defense counsel asserted, that sperm lasts in the vagina.

The court held that defendant failed to provide an adequate offer of proof to create an appealable issue. To preserve an appellate claim concerning the denial of a request to admit evidence, a party is required to make a detailed and specific offer of proof if the record would otherwise be unclear.

The sole support for the proffered evidence was counsel's speculation that complainant's cervical inflammation occurred three days before the alleged assault because sperm could persist for 72 hours. Counsel offered no medical testimony to support his bare assertion about the longevity of sperm or about the general persistence of cervical inflamation.

The court rejected defendant's reliance on medical sources cited in the State's appellate brief indicating cervical inflammation can last three days. It was trial counsel's burden to provide a sufficiently detailed offer of proof at trial, not months or years later on appeal. When evaluating an evidentiary ruling for abuse of discretion, the reviewing court must evaluate that discretion in light of evidence actually before the trial judge.

Since defendant did not provide a sufficient offer of proof, his claim was not subject to appellate review.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

TRAFFIC

§50-2(c)

People v. Armer, 2014 IL App (5th) 130342 (No. 5-13-0342, 10/27/14)

1. The act of drawing blood from a DUI suspect constitutes a "seizure" under the Fourth Amendment, and requires a warrant unless there are exigent circumstances which make it impractical to obtain a warrant. Exigent circumstances have been found where the time needed to obtain a warrant would result in the destruction of evidence. Whether exigent circumstances justify a warrantless search in a particular situation is evaluated on a case-by-case basis.

The natural dissipation of alcohol over time does not create a *per se* exigency which categorically justifies an exception to the warrant requirement for nonconsensual blood testing in DUI cases. **Missouri v. McNeely**, ___ U.S. ___, 133 S. Ct. 1552, 185 L.Ed.2d 696 (2013). However, the natural dissipation of alcohol may support a finding of exigency in a specific case where other factors, such as the procedures in place for obtaining a warrant and the availability of a judge, affect

whether the police can obtain a warrant within a time period that preserves the opportunity to obtain reliable evidence.

2. The court concluded that there were not sufficient exigent circumstances to justify a warrantless draw of defendant's blood. Defendant was involved in a single vehicle accident, and was taken to the hospital for evaluation of his injuries. One deputy followed the ambulance to the hospital, while a second officer remained at the scene of the accident. A third deputy also came to the hospital. The court found that because three officers were available, the investigation would not have been jeopardized had one of the officers attempted to contact the State's Attorney to secure a search warrant. The court noted that the officer did not testify that a fear of losing relevant evidence caused him to order the warrantless draw, and that he decided not to seek a warrant only because he thought he had probable cause and did not need the State's Attorney's assistance.

The court concluded that under these circumstances, a reasonable officer would not have believed that sufficient exigent circumstances were present to justify the warrantless blood draw. The trial court's suppression order was affirmed.

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

WAIVER - PLAIN ERROR - HARMLESS ERROR

§56-2(b)(3)(a)

People v. Hood, 2014 IL App (1st) 113534 (No. 1-11-3534, 10/6/14)

1. The Appellate Court held that defendant had been denied his right to confrontation by not being present at an evidence deposition conducted pursuant to Illinois Supreme Court Rule 414, which allows a party to take a deposition if there is a substantial possibility that the witness will not be available to testify at trial. The prosecutor and defense counsel, but not defendant, were present for the video deposition, and defense counsel cross-examined the witness. Although defense counsel stated that she had waived defendant's presence, the record did not show that defendant personally and knowingly waived his right to confrontation.

The court also held that defendant did not properly waive his confrontation rights under Rule 414. Rule 414(e) provides that defendant and defense counsel may waive defendant's confrontation rights at a deposition in a written waiver. The court held that it was error to admit the deposition without a written waiver.

2. Although defendant failed to raise either issue below, the court reached the issues under the second prong of the plain error doctrine. Under this prong, a

reviewing court may review procedurally defaulted claims where the error is so serious that defendant was denied a substantial right and thus a fair trial. Prejudice is presumed under the second prong due to the importance of the right involved.

The right to confront witnesses is a substantial constitutional right. Both errors involved the right to confront witnesses and thus they both concerned a substantial right reviewable under the second prong of plain error.

3. The dissent would not have found that the errors fell within the second prong of plain error. The second prong only applies to structural errors, a very limited class of cases which does not include defendant's right to be present at a deposition.

(Defendant was represented by Supervisor Shawn O'Toole, Chicago.)

WITNESSES

§57-6(b)(1)

People v. Hood, 2014 IL App (1st) 113534 (No. 1-11-3534, 10/6/14)

1. The right to confront witnesses includes the right to view and hear the witness and to help defense counsel with cross-examination. Although the right to confrontation, like all constitutional rights, may be waived, there is a presumption against waiver, and any waiver must be a knowing, voluntary act with awareness of the consequences. For any waiver to be effective, it must be clearly established that there was an intentional relinquishment of a known right.

2. Here the State conducted an evidence deposition pursuant to Illinois Supreme Court Rule 414, which allows a party to take a deposition if there is a substantial possibility that the witness will not be available to testify at trial. During the deposition, the witness identified defendant as the offender. The prosecutor and defense counsel, but not defendant, were present for the video deposition, and defense counsel cross-examined the witness.

There was no waiver of defendant's confrontation right on the day of the deposition, nor during the next six status hearings. Finally, at a status hearing held over six months after the deposition, the State stated on the record that it had initially requested that defendant be present for the deposition but that defense counsel had waived his presence. Defense counsel confirmed that she had waived defendant's appearance. The video deposition was introduced as evidence during defendant's trial. Defendant made no objection at trial to his absence from the deposition.

3. On appeal, defendant argued that he had been denied his right to confrontation by not being present at the deposition. Although defense counsel stated that she had waived defendant's presence, the record did not show that defendant personally and knowingly waived his right to confrontation.

The Appellate Court agreed. The record contained no waiver of defendant's rights prior to or during the deposition. Additionally, there was no discussion of a waiver during the six status hearings held over a six-month period following the deposition. It was not until over six months later that the parties referred to an alleged off-the-record waiver by defense counsel of defendant's presence at the deposition. The record thus failed to show that defendant knowingly and voluntarily waived his right to confrontation.

4. The court further held that defendant did not properly waive his confrontation rights under Rule 414. Rule 414(e) provides that defendant and defense counsel may waive defendant's confrontation rights at a deposition in a written waiver. The court held that it was error to admit the deposition without a written waiver.

5. Although defendant failed to raise either issue below, the court reached the issues under the second prong of the plain error doctrine. Under this prong, a reviewing court may review procedurally defaulted claims where the error is so serious that defendant was denied a substantial right and thus a fair trial. Prejudice is presumed under the second prong due to the importance of the right involved.

The right to confront witnesses is a substantial constitutional right. Both errors involved the right to confront witnesses and thus they both concerned a substantial right reviewable under the second prong of plain error.

Defendant's conviction was reversed and the case remanded for a new trial.

6. The dissent would not have found a violation of the right to confrontation where defense counsel was present and cross-examined the witness. The dissent also would not have found that any error which might have occurred fell within the second prong of plain error. The second prong only applies to structural errors, a very limited class of cases which does not include defendant's right to be present at a deposition.

(Defendant was represented by Supervisor Shawn O'Toole, Chicago.)